Supreme Court, U. S.
FILED
JAN 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-871

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT QUALITY MERCURY, INC., IN OPPOSITION

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1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

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BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT QUALITY MERCURY, INC., IN OPPOSITION

Respondent, Quality Mercury, Inc., plaintiff in the District Court and appellant below, prays that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above matter on September 27, 1976.

I.

OPINIONS BELOW

In addition to the reports of the decision cited in the petition at page 2, the decision of the Court of Appeals is reported at 542 F. 2d 466 (1976).

II.

QUESTION PRESENTED

This case is not an assault on exclusive franchises. It does not take issue with the concept of exclusive franchises. Contrary to petitioners' claim, it certainly does not involve the typical exclusive franchise imposed by a manufacturer. In short, the case does not involve the question set forth in the petition.

This is the real question: Where a plaintiff alleges that

> (1) an exclusive dealer and a manufacturer acknowledge the need for a second franchise in the exclusive dealer's market area; and
>
> (2) the manufacturer would award a second franchise to plaintiff but for a 1962 letter which has been held out to plaintiff as giving the exclusive dealer the perpetual right to veto the needed franchise,

is the arrangement legal *per se*, or does the complaint state a claim upon which relief can be granted if the allegations are proved?

III.

STATEMENT OF THE CASE

A. The Nature of the Case and Its Disposition Below

Respondent, Quality Mercury, Inc., hereinafter referred to as Quality, adopts the statement of the nature of the case and its disposition below as set forth in the petition. Petitioners hereinafter will be referred to collectively as Prestige, and respondents Ford Motor Company and Ford

Marketing Corporation hereinafter will be referred to collectively as Ford.

B. The Facts

The statement of facts by Prestige requires enlargement. Ford Motor Company, one of the "big three" American automobile manufacturers, markets its vehicles through various divisions of Ford Marketing Corporation. One of these divisions, the Lincoln-Mercury division, markets both the Lincoln, a high-priced luxury car, and the Mercury, a line of automobiles which includes cars of various types and prices.[1]

Ford's established policy is to franchise a single dealer to sell both Lincolns and Mercurys. The two lines complement each other, together offering virtually every type and price level of automobiles manufactured and marketed by United States automakers.[2] The dual franchisee generally benefits from a larger volume with the resulting economies of operation allowing it to serve the public better.[3]

Quality, located in Bloomington, Minnesota, has been a franchised Mercury dealer since January 2, 1968.[4] The Grossmans effectively and directly control Prestige, which is franchised to sell both Lincolns and Mercurys. Prestige is located in St. Louis Park, Minnesota.[5] Since commencing business in 1962, Prestige has been the sole Lincoln dealer in the Minneapolis market.[6] The Minneapolis market includes Bloomington and St. Louis Park which are large suburbs of Minneapolis.

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[1]Complaint, Paragraphs 9, 10, Appendix E at A. 29.
[2]*Id.*, Paragraph 11, Appendix E at A. 29-30.
[3]*Id.*
[4]*Id.*, Paragraph 12, Appendix E at A. 30.
[5]*Id.*, Paragraphs 13-14, Appendix E at A. 30-31.
[6]*Id.*, Paragraphs 13, 17, Appendix E at A. 30-32.

Both Ford and Prestige acknowledge that the Minneapolis market needs a second Lincoln franchise.[7] Ford policy is to appoint additional Lincoln or Mercury dealers at its discretion if the newly appointed dealer is to be located 10 miles or more from any existing dealer selling the automobile to be sold by the new franchise.[8] Quality is located more than 10 miles from Prestige and while the primary market areas of Quality and Prestige border on each other, they encompass substantially different areas.[9]

Despite all this, Quality's repeated applications for a Lincoln franchise have been denied. It remains one of a handful of the approximately 1100 supervised dealers in the Lincoln-Mercury division which is not franchised to sell both Lincolns and Mercurys.[10] The sole reason given for this departure from Ford's established franchising policies, a departure which persists even in the face of an acknowledged need for a second franchise, is that a 1962 letter from Ford to the Grossmans requires Ford to maintain Prestige as the one and only Lincoln dealer in the entire Minneapolis market.[11]

Whatever the letter actually says, it has been held out to Quality[12] and treated by Ford and Prestige[13] as giving Prestige the *perpetual* right to veto additional Lincoln representation in the Minneapolis market irrespective of market needs and conditions and despite Prestige's own inability to serve the market adequately.[14] Under these

[7] *Id.*, Paragraph 17(a), Appendix E at A. 32.
[8] *Id.*, Paragraph 17(c), Appendix E at A. 32-33.
[9] *Id.*, Paragraphs 12-13, Appendix E at A. 30-31.
[10] *Id.*, Paragraphs 11-12, Appendix E at A. 29-30.
[11] *Id.*, Paragraphs 16, 17, Appendix E at A. 31-33.
[12] *Id.*, Paragraph 17(c), Appendix E at A-32-33.
[13] *Id.*

[14] *Id.*, Paragraphs 17(a)-(d), Appendix E at A. 32-33.

Petitioners have made much of the absence of the word "perpetual" from the complaint. *Petition*, n. 21 at p. 18. The Court of Appeals was required to construe all well-pleaded factual allegations as true and draw in favor of Quality all reasonable inferences from those facts. *See Collins v. Handyman*, 341 U.S. 651 (1952); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945). The Court of Appeals examined the character and nature of the exclusive pleaded by Quality and held that "a fair construction of Quality's pleadings is that Ford and Prestige violated the Sherman Act by agreeing to an exclusive franchise in *perpetuity*" (emphasis supplied by the court). Appendix C at A. 22.

In neither the Court of Appeals nor in this Court has Prestige been content merely to argue whether or not its exclusive reasonably may be inferred to be perpetual. Instead it has characterized Quality's argument of perpetuity as "disingenuous" and has asserted that Quality's counsel would have violated Rule 11 of the Federal Rules of Civil Procedure had they included the word "perpetual" in the complaint. *Petition*, n. 21 at p. 18. To support its accusations, Prestige has gone outside the pleadings and referred to a deposition and quoted selectively from the 1962 letter. On the basis of its accusations and the material outside the pleadings, Prestige would have this Court conclude, despite Quality's allegations to the contrary, that "the exclusive was guaranteed to Prestige for only two years and its continued existence thereafter was specifically tied to market conditions." *Id.*

Having opened the door to consideration of material outside the pleadings, Prestige cannot now object to the presentation of additional material by Quality. Appendix I and Appendix II *infra* contain two documents produced by Ford in response to Quality's request for production of documents. These documents explode Prestige's claim that its exclusive is of limited duration or tied to market conditions, or both. However, the documents are included herein not to prove that Quality's complaint states a claim, but to defend against Prestige's spurious allegation that Quality and its counsel have acted in bad faith.

Petitioner N. "Bud" Grossman certainly regards the exclusive as perpetual. He claims "he was advised not to concern himself about the appointment of an additional Lincoln dealer in the market," Appendix I, *infra* at A-2, because Ford "committed to him the exclusivity of the Lincoln franchise in Minneapolis for as long as he was a dealer." Appendix II, *infra* at A-6. Not only does he regard his exclusive franchise as perpetual, he regards the language in the letter pertaining to market conditions as "meaningless," apparently on the advice of Leonard, Street and Deinard, his attorneys on this appeal. Appendix

circumstances, the sole purpose and effect of this veto power is to insulate Prestige unnecessarily from intrabrand competition.[15]

Ford and Prestige's interference with the "unrestrained interaction of competitive forces"[16] has directly injured Quality and is prejudicial to the public interest. Quality has suffered substantial injury to its business, goodwill and property by being deprived of the profits it would have realized from sales, leases, service and other business it would have had if it were a franchised Lincoln dealer.[17] By denying the public a needed Lincoln outlet for sales, leasing and service, Prestige and Ford have also deprived the public of the benefits of competition in the large and significant Minneapolis market[18] which Prestige neither can nor does service adequately.[19]

The foregoing facts are in the complaint. They are the facts for purposes of deciding the real question before this Court which is whether the Prestige exclusive is legal *per se* or whether, instead, Quality is entitled to prove at trial that the maintenance of the Prestige exclusive under these circumstances violates Section 1 of the Sherman Act, 15 U.S.C. §1.

II, infra at A-7. Despite having failed to meet the market penetration standard set forth in the letter, Appendix I, *infra*, at A-1, Grossman interpreted the letter to mean "Lincoln exclusivity in Minneapolis regardless." Appendix II, *infra* at A-7.

Quality's claim that the exclusive is perpetual is hardly "disingenuous." Nor did the Court of Appeals "go too far" in construing the complaint. *Petition*, n. 21 at p. 18. Instead it is Prestige and its counsel who have gone too far, much too far, and have advanced arguments in this Court which are not only inconsistent with Grossman's unequivocal claim of perpetual exclusivity, but which are also contrary to the documentary evidence in the possession of Prestige and its counsel.

[15]Complaint, Paragraph 17(d), Appendix E at A. 33.
[16]Appendix C at A. 16.
[17]Complaint, Paragraph 18, Appendix E at A-33.
[18]*Id.*, Paragraph 19, Appendix E at A. 33-34.
[19]*Id.*, Paragraph 17(d), Appendix E at A. 33.

IV.

ARGUMENT

THE COURT OF APPEALS HELD THAT THE MAINTENANCE OF THIS PERPETUAL DEALER-IMPOSED EXCLUSIVE IN THE ABSENCE OF ANY LEGITIMATE BUSINESS JUSTIFICATION AND DESPITE THE ACKNOWLEDGED NEED FOR A SECOND DEALER IS PRIMA FACIE SUSPECT. ITS DECISION IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS AND DECISIONS OF THIS COURT. IT IS ALSO CONSISTENT WITH THIS COURT'S ADMONITIONS THAT MOTIONS FOR JUDGMENT ON THE PLEADINGS ARE TO BE GRANTED SPARINGLY.

INTRODUCTION

Quality's complaint does not attack the typical exclusive franchise, awarded or even imposed by the manufacturers. It does not seek to overturn the numerous precedents sustaining their validity. Quality challenges only the perpetual maintenance of a dealer-imposed exclusive where those who maintain it acknowledge that another dealer is necessary. By all tests of reason, these circumstances amount to an unreasonable restraint *per se*. Quality has asked only that it be allowed to prove its case.

Many exclusives serve legitimate ends. In the typical situation the manufacturer unilaterally grants an exclusive because in the exercise of its business judgment it has determined that an exclusive best serves its own interests. *See, e.g., Joseph E. Seagram & Sons, Inc., v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970); *Cartrade, Inc., v. Ford Dealers Advertising Association*, 446 F. 2d 289 (9th Cir.

1971), *cert. denied* 405 U.S. 997 (1972). A dealer's request for an exclusive does not render the arrangement unreasonable *per se*, but its legality depends upon the existence of a legitimate business purpose. *E. A. Weinel Construction Co. v. Mueller Co.*, 289 F. Supp. 293 (E.D. Ill. 1968).

Prestige's contention that Quality has pleaded a simple and typical vertical exclusive agreement between Ford and Prestige "and nothing more," *Petition* at p. 5, ignores Quality's allegations of much more. The endless maintenance of an exclusive at the sole discretion of the exclusive dealer in a territory admittedly in need of a second dealer is not simple, it is not typical and it is not legal. The emphasis by Prestige on *Cartrade, supra, Weinel, supra,* and other cases holding that an exclusive is legal so long as it does not unreasonably restrain trade[20] is misdirected. Quality does not dispute the validity of such precedents. It emphatically disputes their applicability.

The Court of Appeals agreed with Quality. While explicitly recognizing the legitimacy of the normal exclusive, Appendix C at A16, 18, the Court distinguished the Prestige exclusive.

Ford did not unilaterally deny Quality's franchise application. The denial was joint or collaborative in that Ford allowed Prestige in its sole discretion to veto the application.

There were no valid business reasons for the denial. No legitimate business consideration can justify Prestige's

[20] *Bushie v. Stenocord Corp.*, 460 F. 2d 116 (9th Cir. 1972), quoted in *Petition* at pp. 11-12; *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F. 2d 637 (10th Cir. 1973), *cert. denied* 411 U.S. 987 (1973), quoted in *Petition* at p. 12; *Ace Beer Distributors, Inc., v. Kohn, Inc.*, 318 F. 2d 283 (6th Cir. 1963), quoted in *Petition* at p. 13.

perpetual veto power over competition, even where additional Lincoln representation is necessary.

This rare, if not singular, situation is, as the Court of Appeals concluded, *prima facie* suspect.[21]

A. The Denial of Quality's Application Was Joint or Collaborative

Prestige in its sole discretion determines if the Minneapolis market will have a second franchise. Pursuant to the 1962 letter, Prestige has exercised its veto to maintain its exclusive. This supercedes Ford's franchising policies. It thwarts Ford's interest in establishing a Lincoln franchise in an area determined to need one. To treat this exclusive as having been imposed unilaterally by the manufacturer is to ignore Quality's complaint and the 1962 letter itself. The denial of Quality's application was clearly the result of joint or collaborative action by Ford and Prestige. In fact, Prestige now admits that "under its *agreement* with Ford [Prestige] had sole discretion to determine whether a horizontal competitor could enter the Minneapolis market" (emphasis added). *Petition* at 17.

[21] Appendix C at A. 21-22. *See also* Turner, *The Definition of Agreement under The Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 704 (1962).

Because the Court of Appeals distinguished the Prestige exclusive from the normal exclusive franchise, there is no conflict between this case and *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F. 2d 980 (9th Cir. 1976), *cert. granted* 45 Law Week 3299 (1976). *See Petition* at 10-11. In fact, the Court of Appeals cited many of the cases relied upon by the *Sylvania* court for the proposition that exclusives normally are valid. Quality alleged and the Court of Appeals found, however, that the Prestige exclusive was atypical. Even if the questions of the location clause and the exclusive dealing arrangement are "inextricably bound together", *Petition* at 11, this is not the case to review in connection with *Sylvania*, since the Prestige exclusive is quite different from those the *Sylvania* court asserted were legal.

Ford would grant Quality's application if Prestige would withdraw its objection.[22] However, the Prestige exclusive continues to exist because Ford has become the instrumentality, the tool, of one of its select franchises for purposes of horizontal territorial allocation. *United States v. Sealy*, 338 U.S. 350 (1967). Ford has allowed Prestige, "concerned [solely] with [Prestige's] own position", to dictate exclusivity. *United States v. Chicago Tribune-New York News Syndicate, Inc.*, 309 F. Supp. 1301 (S.D.N.Y. 1970). This joint or collaborative conduct of Ford and Prestige is similar to that condemned in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073 (D.N.J. 1973), *affd. in part*, 521 F. 2d 1230 (3d Cir. 1975).

In *Topco, supra*, 25 small grocery store chains formed a cooperative association to serve as purchasing agent for Topco-brand products. Applicants for membership required the approval of both 75 percent of the membership and the board of directors. However, if either the closest existing member or any member within 100 miles voted against membership, the required approval ratio rose to 80 percent. This Court found that territories were allocated to members who did no business in the area on the theory they might wish to expand in that direction at a future date. The voting system was condemned by this Court because the "veto of sorts over actual and potential competition" when coupled with exclusivity worked "effectively to insulate members from competition in Topco-brand goods." *Topco, supra* at 602.

Prestige, like Topco members, has an exclusive in an

[22]Complaint, Paragraph 17, Appendix E at A. 32-33.

oversized market. And it insulates itself from intrabrand competition by a veto. The veto, however, is more than a veto of sorts; it is an absolute veto.

Prestige would limit the holding of *Topco, supra*, to cases where the franchisee owns or otherwise controls the franchisor, or where more than one franchisee participates in the conspiracy. There is no rational reason for such a limitation. It cannot matter if dealer control of the manufacturer arises from partial ownership or from some other factor. And *American Motor Inns, supra*, held that a single franchisee without an ownership interest in the franchisor may conspire with the franchisor to isolate illegally the franchisee from intrabrand competition. *Cf. Chicago Tribune, supra.*

In *American Motor Inns, supra*, plaintiff applied for a Holiday Inns franchise for Newark, New Jersey. The franchise committee, consistent with established policy, sent so-called radius letters to the nearest three Holiday Inns franchisees, one of whom was Fleck, the principal owner of an existing Holiday Inn in Newark. Fleck and another recipient of the radius letters objected to plaintiff's application. Though the franchise committee favored granting the application, Holiday Inns' policy required that the application be forwarded to the executive committee if any recipient of the radius letter objected. The executive committee denied plaintiff's application because of the objections.

Even though the franchisees did not combine to "create and own Holiday Inns, as the Topco franchisees created and owned Topco Associates," the court held that the radius letter policy in general allowed Holiday Inns franchisees to utilize the "parent Holiday Inns as Topco fran-

chisees utilized the 'parent' Topco Associates to allocate territories horizontally so as to restrict intrabrand competition." *American Motor Inns, supra* at 365 F. Supp. 1090.

The District Court, however, did not stop there. It found a separate local conspiracy between Fleck and the parent Holiday Inns:

> Regardless of whether the radius letter policy in *general* constitutes a conspiracy to allocate territories horizontally, as I have held above, the facts surrounding the Elizabeth application by AMI, the dealing by Holiday Inns with Fleck, and the ultimate denial of a franchise to AMI, constitute a *local* conspiracy to allocate territories horizontally so as to prevent any competition between Fleck and any new Holiday Inns franchisee (emphasis supplied by the Court). *Id.* at 1091.

The dealing between Holiday Inns and Fleck included determinations by both Holiday Inns and Fleck that the Newport airport area was favorable for motel expansion, a representation by Holiday Inns that Fleck would be awarded a franchise in the airport area, and the subsequent denial of plaintiff's application for a franchise in the identical area after objection by Fleck. Like Ford, Holiday Inns treated its franchisee's objection to a needed franchise as dispositive. In fact Holiday Inns told plaintiff to "make a deal" with Fleck and Holiday Inns would abide the result. *Id.*

Because the issue of a general conspiracy on a national level was not fairly litigated in the District Court, the Third Circuit reversed the holding on the general effect of the radius letter policy. *American Motor Inns, supra* at 521 F. 2d 1244. However, it unequivocally affirmed the holding that a local conspiracy existed. In so doing, the Third Circuit distinguished the Newark situation from the typical vertical restraints present in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and in the other cases upon which Prestige relies. The court declared at 521 F. 2d 1243:

> Concededly, HI, in the case at hand, was not created, nor is it in general controlled, by its licensees, as Topco was. Further, there are no rigidly defined territories—as in Topco—within which HI's Newark-area franchisees have the exclusive right to operate. However, according to the finder of fact here, HI treated the franchisees' objections to AMI's application as dispositive and thus allowed its licensees, like the existing Topco members, to determine whether the applicant would be allowed to compete with them. Although there are no explicit limits on the area over which the Fleck and Carteret franchises exercise veto power, the radius letters from HI, together with the significance accorded to the franchisees' objections, function like the combination of the exclusivity provisions and the veto power over new members of *Topco* "effectively to insulate members from competition" under the Holiday Inn Trademark.
>
> HI's action in denying AMI's application, according to the trial court, was not taken unilaterally, but rather *in concert with one or more* of its licensees. If HI had acted independently in refusing AMI's request, such conduct might have been akin to the vertical restraints in *Schwinn*. But where, as here, the action in question is ascertained by the finder of fact to be joint or collaborative, it is sufficient to constitute a "combination or conspiracy" within the meaning of the Sherman Act (emphasis added, footnotes and citations omitted).

There is no reason to review the holding that the denial of Quality's application was joint or collaborative. Prestige has admitted that it has sole power to determine whether it will have horizontal competition in the Minneapolis market, Petition at 17, and Ford has treated its exclusive franchisee's veto of a needed franchise as dispositive. *Topco, supra,* and *American Motor Inns, supra,* control the case pleaded by Quality. The decision of the Court of Appeals was wholly consistent with both cases.

B. The Veto Power Does not Exist to Protect Any Legitimate Business Interest of Either Ford or Prestige. It Exists Only to Further the Illicit Ambitions of Prestige.

Prestige apparently believes that exclusive territorial franchises are legal regardless of the circumstances. This is not the law. The law is that "an exclusive dealership is valid under the antitrust laws even though it restrains trade, provided the restraint is not unreasonable." *Chicago Tribune, supra* at 1307. Whether the Prestige exclusive is reasonable can be determined only after an examination of the facts peculiar to the automobile industry in general as well as those facts peculiar to this manufacturer, this dealer and this market. The endless maintenance of an exclusive where a second dealer is necessary and where the existing dealer calls the shots compels such an examination. *Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918). Once the particular facts of the case have been developed the rule of reason enunciated in *Chicago Board of Trade, supra,* must be applied to determine the reasonableness of the restraint:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. *Id.* at 238.

Prestige's argument that its exclusive is legal regardless of term, regardless of any changes in the market and despite the presence or absence of any other business justification would repeal the rule of reason. To support its overreaching proposition, Prestige cites *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822, *rehearing denied* 355 U.S. 900 (1957), *rehearing denied* 357 U.S. 923 (1958), and *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *affd.* 239 F. 2d 176 (4th Cir. 1956). To apply *Packard* and *Schwing* to this case is either to ignore Quality's complaint to conclude that the facts justifying those exclusives are present in this case, or to interpret *Packard* and *Schwing* as establishing a rule of *per se* legality for dealer-imposed exclusivity in

the automobile industry. Either position is untenable. The *Packard* and *Schwing* doctrines are of limited scope and have no application to the particular facts of this case.[23]

The major justification for the *Packard* and *Schwing* exclusives was the relatively insignificant market shares commanded by the now defunct automakers. *Packard, supra* at 243 F. 2d 421; *Schwing, supra* at 138 F. Supp. 905-06. In *Schwing*, for example, the court strongly intimated that its decision would have been different had the manufacturer held a stronger position in its market. *Schwing, supra* at 138 F. Supp. 906. Mr. Justice Brennan's analysis of *Packard* and *Schwing* also reflects this view:

> In [Packard] the court observed, in holding an exclusive franchise arrangement not violative of the Sherman Act:
>
> 'The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.'
>
> The doctrine of the *Packard* and *Schwing* cases is, however, of necessarily limited scope; not only were the manufacturers involved much smaller than the "big three" of the automobile industry against whom they competed, but both had experienced declines in their respective market shares. In short, both the manufacturers and the dealers in *Schwing* and *Packard* needed the exclusives in order to enhance their positions in competition with the large automakers. *White Motor Co. v. U.S.*, 372 U.S. 253, n. 8 at 269-270 (1963).

[23]In *American Motor Inns, supra*, the Third Circuit questioned whether *Packard* is still good law in the wake of *Topco, supra. See* 521 F. 2d, n. 38 at 1244.

Contrary to the manufacturers and dealers in *Packard* and *Schwing*, neither Ford nor Prestige needs the exclusive to enhance its competitive position. Ford is the nation's second largest automaker. It is hardly on the verge of extinction as the manufacturers in *Packard* and *Schwing* were at the time of those decisions.

Where, as here, the restraint imposed by the exclusive is clearly excessive for the manufacturer's needs, it is appropriate to determine whether the dealer has some legitimate business need which warrants the protection. *Note, Restricted Channels of Distribution under the Sherman Act*, 75 *Harv. L. Rev.* 795, 826 (1962). An examination of the peculiar aspects of the Prestige exclusive can lead only to the conclusion that it is also excessive for any of Prestige's legitimate needs and exists only to further the illicit ambitions of Prestige.

The size of this exclusive is unreasonable. Ford usually finds a ten-mile area sufficient for the protection of its franchisees.[24] Yet Prestige has laid claim to a far larger territory than usual and, like that in *Topco*, far larger than it can and does service adequately. *Topco, supra* at 602. Changing market conditions dictate the need for a second dealer in the Minneapolis market. Prestige's veto of Quality's application parallels Fleck's veto of a needed franchise in an area found favorable for expansion. *American Motor Inns, supra* at 365 F. Supp. 1090.

[24]Complaint, Paragraph 17(c), Appendix E at A. 32-33.

The suspect exclusive is not only located in an oversized market; it is also located in an area over which Prestige exercises perpetual control. As the Court of Appeals noted, "a perpetual exclusive franchise is suspect under the Sherman Act because changes in conditions, unforeseen when the exclusive was granted, may combine to create an anti-competitive effect." Appendix C at A22. *Cf. Chicago Board of Trade, supra* at 238. The term of the agreement is always a "useful yardstick" in measuring its reasonableness, *Note, Restricted Channels, supra* at 826, and the justification for any exclusive "runs out after a reasonable period." *Turner, supra* at 705. If exclusives of one or two years have generally been found adequate, even in the automobile industry where the required initial investment is relatively high, *Note, Restricted Channels, supra* at 827, Ford and Prestige hardly can demonstrate the need for a perpetual exclusive in an oversized market.[25]

Despite the fact that exclusive contracts by definition restrain trade, they have been sustained where they are used as a means to enhance competition generally. *See, e.g., Packard, supra.* But while exclusives are often sustained, there is nothing magical about them. They cannot unreasonably restrain trade any more than can other contracts. Where an exclusive exists in the face of unquestioned need for more market representation, that is to define illegal restraint of trade by example. Minneapolis and its suburbs were a very different world in 1962. Yet the Prestige exclusive has grown to a petpetuity to be maintained at the sole discretion of Prestige and even in the face of inadequate market performance by Prestige. The

[25]It is interesting to note that the absolute right of Prestige to an exclusive presumably was to last only two years.

case is a classic example of how a contract possibly benign enough in the beginning can become a malignancy requiring judicial surgery.

The Court of Appeals' conclusion that the Prestige exclusive is suspect need not be reviewed. The Court of Appeals did not ignore *Schwing* and *Packard.* It distinguished those cases and instead followed *Topco* and *American Motor Inns* in holding that perpetual exclusivity in an oversized market, coupled with the absence of any legitimate business justification for such protection works effectively to insulate Prestige unnecessarily from any intrabrand competition.

C. The Decision of the Court of Appeals Is Consistent With This Court's Admonitions Against the Over-Zealous Use of the Disfavored Judgment on the Pleadings

To utilize the Draconian judgment on the pleadings to dismiss a complaint is to conclude that it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hospital Building Co. v. Trustees of Rex Hospital,* 965 S.Ct. 1848, (1976); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Because Quality is entitled to the benefit of its well-pleaded allegations and all reasonable inferences arising therefrom, dismissal of its complaint is akin to holding that there are no limits on manufacturer-dealer agreements which restrict the entry of competition for the dealer. Such a holding would be directly contrary to *Topco, supra,* and *American Motor Inns, supra.* It also would disregard the rationale of the numerous cases holding that exclusives are legal only *if* they do not unreasonably restrain trade.

Prestige's "floodgates" argument assumes that its franchise is typical. It is anything but, and litigation arising from this peculiar, and presumably rare, but pernicious type of arrangement inevitably will be isolated. The fact is that none of the franchisees in cases where exclusives have been sustained, and in all probability few, if any, of the other franchisees existing in the United States today have been able to extract from the franchisor the perpetual right to veto horizontal competition in an oversized market which both the franchisee and the franchisor admit needs additional representation. This repugnant arrangement is typical of those which have been condemned because of overreaching on the part of the dealer. *Topco, supra; American Motor Inns, supra; Chicago Tribune, supra.*

The reasonableness of a restraint is itself a question of fact, *Thomason v. Hospital T. V. Rentals, Inc.*, 272 F. 2d 263 (8th Cir. 1959), and necessarily involves the determination of numerous other underlying fact questions. *Chicago Board of Trade, supra.* Because of the implicit *per se* determination of the legality or illegality of the particular restraint when antitrust cases are dismissed summarily, such dispositions are disfavored. *Hospital Building Co., supra* (judgment on the pleadings dismissing antitrust complaint reversed); *White Motor, supra* (summary judgment in favor of government in antitrust action reversed).

Ford has gone much further than unilaterally awarding an exclusive franchise. It has allowed Prestige to extract a perpetual veto which can be exercised even over needed competition. Such an arrangement demands justification. *Note, Restricted Channels, supra* at 824. *See also,* Appendix C, n. 6 at A22-23. It cannot be declared *per se* legal

on the pleadings because no case, even after a full trial, has upheld such an exclusive. In ordering Ford and Prestige to justify their suspicious agreement, the Court of Appeals merely obeyed this Court's repeated admonitions against the overzealous use of summary dismissals. There is nothing to review.

CONCLUSION

Prestige's perpetual veto over horizontal competition, even if competition is needed, is so unique that it is hard to imagine a similar case. There will be no torrent of litigation as a result of the Court of Appeals' decision that this suspect arrangement should be put to the test of discovery and a trial. In ordering further proceedings the Court of Appeals followed antitrust law as developed by *Topco* and *American Motor Inns,* and heeded this Court's warnings that antitrust complaints should be dismissed only in the most extreme circumstances.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 24, 1977

APPENDIX I

EXHIBIT III

Ford Marketing Corporation — Twin Cities District
Inter Office Communication — Lincoln-Mercury Division
October 25, 1971

MEMO TO FILE

Subject: Prestige Lincoln-Mercury
Minneapolis, Minnesota

Re: Lincoln Penetration Performance

Accompanied by Mr. W. A. Litle, Midwestern Regional Sales Manager, contacted Mr. Norman "Bud" Grossman regarding the fact that his Lincoln penetration on a year-to-date basis had been below District Average for a consistent period of twenty months. In view of his failure to attain District Average penetration during this period, we advised Mr. Grossman he had not fulfilled the condition of the Divisional letter of April 11, 1962, which stated . . . "We would not propose any additional Lincoln representation in Minneapolis for at least two years from the date of the letter, and then only if Lincoln penetration of Price Class in the Minneapolis locality was less than District Average".

We presented Mr. Grossman the attached letter (which letter covers a period of eighteen months performance) detailing his below District Average penetration, and, in summary, stated that the Division believed it has cause to provide additional Lincoln representation in Minneapolis because of Prestige's inability to provide adequate penetra-

tion for one and one-half years. Mr. Grossman became quite perturbed when confronted with this information stating that the Division had a moral obligation to continue the existing Lincoln franchise arrangement in the Minneapolis market. Mr. Grossman claimed that in 1962 when he became the Lincoln-Mercury dealer, Divisional representatives had contacted him repeatedly to take on the franchise and he claims he was advised not to concern himself about the appointment of an additional Lincoln dealer in the market. Mr. Grossman further remarked that the former Lincoln-Mercury dealership, Mitchell-Boyer, Inc., had been a losing proposition and he himself had lost money for several years before Prestige Lincoln-Mercury became a profitable venture.

Mr. Grossman then pointed out that at no time was he advised by a Company representative that his performance was below District Average and if he did not attain District Average within a specified period of time, the Devision intended to appoint additional representation. He admitted that we had advised members of Prestige Lincoln-Mercury management on a number of occasions that his performance was below District Average, but never had we stated that if the performance did not improve and attain District Average within a specified time that we would proceed to appoint additional Lincoln dealers. Mr. Grossman felt very strong that this should have been done as a matter of good business practice and as a courtesy to Prestige Lincoln-Mercury. Mr. Grossman further remarked that his attorneys were fully cognizant of the contents of the Division letter and the letter did not state any specific period of time that below District Average performance

would occasion the appointment of additional Lincoln representation.

Mr. Grossman also made the point that he failed to understand the Division and Company position on Lincoln franchising if his purchases of Ford Motor Company products by the Gelco Corporation were considered. He stated that seven years ago Gelco had not purchased a Ford Motor Company product in their leasing company, and this year they would purchase between seven and eight thousand units for lease—second only to purchases by the Hertz Corporation. He did not feel that the Division had carefully considered the value of these purchases versus additional sales by Prestige of one hundred or two hundred more Lincolns during this period.

After some considerable discussion, Mr. Grossman's first request with respect to this situation was that the Company and the Division drop the entire matter of additional Lincoln franchising in Minneapolis. As an alternative, he then stated he was aware that there were additional markets in the country whose situation was similar in that they only had one Lincoln dealer. He said "When you get these markets straightened out, then advise me that Minneapolis is the only existing market with a single Lincoln dealer, but don't start here first."

Mr. Grossman then stated that if the Division felt that a letter was necessary, he should be given a period of time in which to achieve District Average penetration, or some other acceptable standard, and requested that the time period be the 1972 model year. At this point, Mr. Grossman requested we take back the attached letter until such time as we came to a decision as to the course we would pursue. He said he had no desire to take on the Ford Motor

Company in a legal action, but if we intended to enforce the attached letter, he would immediately seek a court injunction to prevent us from franchising additional Lincoln dealers and, win—lose—or draw, would initiate legal action through the courts to prevent us from franchising additional Lincoln dealers.

We advised Mr. Grossman that we would have further discussions with management and contact him in the near future with regard to our decision.

/s/ G. H. HEGNER
District Sales Manager

APPENDIX II

MEMORANDUM TO FILE

January 7, 1972

Reference: Prestige Lincoln-Mercury
Minneapolis, Minnesota

A conference was held on Thursday, January 6, 1972, at the Twin Cities District Sales Office with the following people in attendance:

Mr. A. L. Whiteman, General Sales Manager, L-M Div.
Mr. W. A. Litle, Regional Sales Manager, Midwest Region
Mr. G. H. Hegner, District Sales Manager, Twin Cities
Mr. Bud Grossman, Dealer Principal
Mr. Harold Grossman, Dealer Principal
Mr. Tom Grossman, Dealer Principal

Prior to the conference, I visited the Grossmans at the Prestige Lincoln Mercury dealership, toured the facilities, and became acquainted with Mr. Elliott, their new General Manager.

In opening the discussion at the conference, I advised the Grossmans that my purpose in coming to Minneapolis was not to settle the issue of the exclusivity of their Lincoln franchise in Minneapolis, but rather to provide me an opportunity to get acquainted with them and their operation and to merely discuss with them their feelings regarding the matter.

I asked Mr. Bud Grossman to review for me the entire background of the matter and give me his feelings on it. This review took several minutes and generally followed the pattern as outlined in our files except that he

told me that when he took the Lincoln-Mercury deal, the Division was so hard up for representation and so anxious to have him as a dealer that they committed to him the exclusivity of the Lincoln franchise in Minneapolis for as long as he was a dealer. Bud Grossman further stated that he was aware at the time—and told the Lincoln-Mercury principals—that sometime, the Lincoln franchise would be very valuable and that the Division would want more than one dealer in Minneapolis and for them not to forget that his taking the deal was conditioned on their commitment for exclusivity for as long as he was a dealer. (He reiterated this point several times.)

He pointed out that when he first took the deal in a downtown location, he lost many, many thousands of dollars; but had, through time and the assistance of the Lincoln-Mercury Division people, built the dealership up to where it was now—a successful operation, providing total Lincoln-Mercury penetration that was considered satisfactory and one which he—and he felt sure the Lincoln-Mercury Division—was proud of.

He went on to say that on several occasions, the matter of appointing additional Lincoln dealers in the market has been discussed with him. On one instance, he said, he had "thrown out of his dealership" Pat Brescia and Bill Moriarity—who was there to "advise that the Division was breaking their word on this matter." He indicated that on one occasion—during the time his mother was dying, which was a difficult period for him—he had to come to Detroit on this matter, at which time he had spoken to Paul Lorenz as well as Matt McLaughlin and that he understood that as a result of those conversations, the matter was put to bed.

At this point he said that he considered himself the Ford Motor Company's second biggest customer—buying up to 10,000 Ford Motor Company vehicles this year through GELCO; and that in his mind, it was absolutely unbelievable that good businessmen would upset this kind of a customer and good dealer over a matter which, in his opinion, had been "put to bed" several times.

I listened to his entire story without interruption and made sure that no one in the group became emotional over the issue. I told him it wasn't clear in my mind what he meant about a remark he had made earlier to Mr. Hegner . . . something to the effect that "why are you picking on me when you have other good-sized markets where you only have one Lincoln dealer—go get them fixed first, then come see me." Mr. Grossman stated that what he meant by that was, it seemed inappropriate to him that we would be talking to him in terms of a company policy when there were several exceptions to it already that had not been concluded. He went on to say that the remark was a casual one—of no significance.

I assured him it was not our intention to single him out in any way.

I told Mr. Grossman that his understanding regarding a commitment by the Division to Lincoln exclusivity as long as he was a dealer did not seem compatible to me with the letter that had been given him. He stated that the wording in the letter regarding district average was meaningless, and that his attorney had so advised him. His interpretation of the letter was that . . . as had been stated . . . "Lincoln exclusivity in Minneapolis regardless." I advised him frankly that it wasn't what the letter said. He said that his attorney had advised him that the letter content regard-

ing district average was not applicable today because of shortgages of Lincolns and Marks from time to time; the shift in the luxury segment of the market since the letter; as well as the fact that the district average was meaningless in such a small market.

The conference was closed on a congenial note with me telling Mr. Grossman that as I indicated earlier, no conclusions were being drawn at this time. He stated he wanted to get this matter settled once and for all—he was tired of it being a matter of discussion between us. He further stated that if we chose to interpret the letter on a basis which resulted in our establishing a specific timetable for him and advising that failure to accomplish district average based on this timetable, he would be forced to begin litigation proceedings immediately. I told Mr. Grossman in closing that I would discuss the matter with other members of Division management and determine what course of action would be taken, if any. I further encouraged him to continue to provide good representation on all car lines in the marketplace. Mr. Grossman assured me that this would be done.

/s/ A. L. WHITEMAN
General Sales Manager